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In the

Supreme Court of the United States

OCTOBER TERM, 1962

CARSON J. MAY,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,
A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR FRANKLIN COUNTY, OHIO

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OPINIONS BY COURTS BELOW

Petitioner, Carson J. May, respectfully prays that a writ of certiorari issue to the Court of Appeals for Franklin County, Ohio, to review the judgment and decision of that Court in Case No. 6749 entitled Carson J. May vs. Pennsylvania Railroad Company, a corporation, which court in an opinion which is as yet unreported, dated March 13, 1962, (App. B), affirmed the judgment of the Court of Common Pleas for Franklin County, Ohio. The said Court of Common Pleas for Franklin County, Ohio, entered a judgment for respondent pursuant to a verdict directed for respondent at the close of the petitioner's evidence. Petitioner's motion for new trial was denied, and the unreported decision of the same trial court on that motion, dated March 14, 1961, is appended to this petition (App. A).

JURISDICTION OF THE COURT

The entry of the judgment of Court of Appeals for Franklin County, Ohio, of which review is sought, was dated March 29, 1962 (App. C).

Petitioner sought review of the judgment and decision of the Court of Appeals for Franklin County, Ohio, by motion filed in the Ohio Supreme Court for an order directing the Court of Appeals to certify its record to the Ohio Supreme Court. Review by the latter court was discretionary upon the ground that the case was one "of public or great general interest," Constitution of Ohio, Article IV, Section 2. This review was denied by the Ohio Supreme Court when it overruled petitioner's motion to certify its record by entry dated October 10, 1962 (App. D). That denial constituted a refusal by that court to exercise its discretionary power to review, and the denial did not constitute an affirmance of the judgment of Court of Appeals and was not a decision upon the merits. *Village of Brewster vs. Hill*; 128 Oh. St. 343, 352, 353; *The Swetland Co. vs. Evatt, Tax Commissioner*, 139 Oh. St. 6, 18 (paragraph 2 of syllabus); *Keesecker, a minor, vs. The B. M. McKelvey Co.*, 141 Oh. St. 162, 169 (paragraph 3 of syllabus).

Under the law of Ohio, therefore, when the Ohio Supreme Court denied motion to certify on October 10, 1962, the judgment of the Court of Appeals for Franklin County, Ohio, became the final judgment of the highest court of the State of Ohio in which a decision could be had. *Cuyahoga River Power Co. vs. Northern Realty Co.*, 244 U.S. 300, 37 S. Ct., 653.

This action arose and was tried under the provisions of the Federal Employers' Liability Act, Title 45, U. S. C., Sections 51 and following. Jurisdiction of this court to review the said judgment of the Court of Appeals for Franklin County, Ohio, by writ of certiorari is, accordingly,

conferred upon this court by the provisions of the Act of June 25, 1948, c. 646, 62 Stat. 929, Title 28, U.S.C., Section 1257. The portions of that section pertinent to jurisdiction in this review provide as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> * * * * * * * * * * *
> "(3) By writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * or statutes of * * * the United States."

QUESTIONS PRESENTED FOR REVIEW

1. In this action arising under the Federal Employers' Liability Act where petitioner, a track laborer, while carrying a heavy tub of coal with another employee of respondent and while following the other employee who preceded him through a doorway, was injured when he was forced to twist and lift upward in order to clear the moving tub between the side of the doorway and the side of a motor car parked in the doorway, were the Ohio courts correct in holding that the respondent as a matter of law was not negligent for the reason that the occasion of the injury appeared to be the first time that such a tub with loaded coal had been carried through the doorway while the motor car was in the entrance way and it appeared that this was the place where the car was customarily located when work was to be done on it?

2. Under the foregoing circumstances were the acts and conduct of the other employee those of the respondent so as to present an issue for the jury on respondent's exercise of reasonable care, or as the Ohio courts apparently reasoned, must those acts and conduct be judicially discounted, ignored or chargeable to petitioner by means of the courts' own conclusions that the evidence presented no extraordi-

nary activity on the part of the respondent railroad or that petitioner was chargeable with equal control over the job?

3. In holding that respondent as a matter of law was not negligent, did the Ohio courts interject conduct of the petitioner in alleged concert with another employee of respondent, that is, the doctrine of assumption of risk or contributory negligence by petitioner or the fellow-servant rule, as an unlawful and absolute defense to respondent under the guise of non-negligence of respondent?

4. In making the judicial determination of whether an issue of negligence was presented for the jury should the Ohio courts have viewed the evidence and the conduct of respondent as a whole?

5. From such a consideration could the jury conclude from the evidence with reason that respondent was negligent and that such negligence played some part in producing the petitioner's injury?

STATUTES INVOLVED

This action invoked the Federal Employers' Liability Act. Title 45, U.S.C., Sections 51 and following. That portion of Section 1 of that Act, Title 45, U.S.C., Section 51, which is involved in this review, provides as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, wharves, or other equipment."

Also involved in this case are sections 53 and 54 of that Act dealing with contributory negligence and assumption of risk, respectively. Title 45, U.S.C., Section 53:

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Title 45, U.S.C., Section 54:

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employees."

Jurisdiction of the federal claim arising under the foregoing act on the part of the State court is provided in Section 56 of the act, Title 45, U.S.C., Section 56, which provides as follows:

"No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be

doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states."

STATEMENT OF THE CASE

This action was filed, answered and tried under the Federal Employers' Liability Act, Title 45, U.S.C., Sections 51 and following, in the Court of Common Pleas for Franklin County, Ohio. Petitioner's cause of action was based upon allegations that he sustained injuries while employed by respondent, a common carrier by railroad, resulting from respondent's negligence. At the close of petitioner's evidence at the trial, the Court of Common Pleas sustained the respondent's motion for a directed verdict in favor of the respondent and judgment was entered accordingly. Petitioner's motion for new trial was overruled and the trial court's decision thereon is appended to this petition. (App. A) The Court of Appeals for Franklin County, Ohio, in Case No. 6749 affirmed the decision and judgment of the Court of Common Pleas (Opinion, App. B) and the entry of affirmance was filed in the Court of Appeals on March 29, 1962 (App. C). Petitioner sought review in the Ohio Supreme Court by motion to certify the record, but that motion was denied by the Ohio Supreme Court by order entered October 10, 1962 (App. D).

At the trial the evidence showed that petitioner was a laborer for the respondent and a member of a track crew assigned to the job of maintaining the tracks and right of way of respondent. On the morning of January 15, 1957, petitioner reported for duty at the respondent's Spruce Street tool house in Columbus, Ohio. (R. 3, 4, 72) This tool house was the place where the men reported for work and also was the place where they returned after they finished their work. (R. 10, 75, 76) There were t o rooms in

the tool house, one containing a stove, toilet, and washing facilities (R. 76) and the other housing a motor car which was used by the crew in going to and from their places of work on the tracks of respondent. (R. 74) The tool house had formerly been heated by a steam-heating system, but this had been removed. (R. 12) The only means of heating the tool house was an old iron, potbellied stove in which coal was burned. (R. 12, 76) No coal was provided for that stove by respondent. (R. 6) There was neither a bin nor a pile of coal inside or outside of the tool house. (R. 5, 76) In order to provide coal for the stove, it was necessary for the men of the crew to take an old washtub and go out along the tracks and to pick up pieces of coal that were strewn along the tracks. (R. 7) The gathering of the coal for the stove was necessary not only to provide warmth and comfort for the men, but, according to petitioner, to prevent the washing and toilet facilities from freezing. (R. 80) Picking up the coal, furthermore, was a part of the crew's duties in keeping the area free of debris. (R. 7, 115)

The foreman in charge of the crew, Tracy E. Hopper, testified that on the morning in question the motor car required repairs. Due to the fact that there was no light provided inside the tool house in the room where the motor car was housed, it was necessary to push the motor car out of the room so that sufficient light could be shed on the car to perform the work. (R. 4) The foreman and his crew pushed the motor car, accordingly, out from the room to a point where it was approximately half inside and half outside of the doorway. (R. 4, 75) The work was thereupon completed.

The foreman further testified that some of the members of the crew suggested that they go out and get coal for the stove in the tool house and that he okayed the suggestion. (R. 5) Petitioner testified that the foreman told them to

get the coal. (R. 77) In either event the record is clear that the foreman knew that petitioner and another crewman, Henry Brown, took the tub and went out through the doorway in order to pick up coal among the tracks for the stove. (R. 8) This was the method that had been used in the past to get coal for a considerable period of time; and the foreman knew of this and so testified (R. 5, 6).

The foreman then left the immediate area to place a telephone call to respondent for permission to put the motor car onto the tracks so that the crew could proceed to their place of work for the day. (R. 9) In the meantime petitioner and Brown went from place to place among the tracks in the area, picking up coal and putting it into the tub, until they eventually filled the tub with the coal. (R. 77, 78) The two of them then started back toward the toolhouse carrying the tub between them, each holding one of the two handles on the tub. As they arrived at the doorway to the tool house, Brown was leading and passed through the doorway first, followed by the tub and then the petitioner. The doorway was still blocked by the motor car. As the tub came to the doorway, there was not sufficient clearance to permit the tub to pass through between the lower part of the motor car and the side of the doorway. As petitioner followed through the doorway, therefore, it was necessary for him to lift the tub upward where the motor car was narrower and thereby clear the lower part of the motor car and at the same time to twist his body sideways in order to get through (R. 78-80). In so doing, petitioner injured his back, suffering herniated discs, which injuries eventually required surgery upon his back and removal of the herniated discs. (R. 34, 35, 48-50) Petitioner in the opinion of the operating physician is permanently disabled from heavy manual labor. (R. 48)

At the conclusion of the cross examination of petitioner by respondent's counsel, the trial judge further cross examined the petitioner. (R. 127-129) The judge was successful in drawing from the petitioner the admission that the foreman was some 300 or 400 feet away from the doorway as Brown and petitioner approached the doorway and that the crew would not go out onto the job until receiving an order from the foreman to do so. From that the trial judge drew the further admission from petitioner that there was, consequently, no hurry about getting the coal into the tool house. Petitioner, in further response to the court's questioning testified that he had never carried coal into the tool house when the motor car was in the doorway but that he had frequently carried coal in the tub to the stove when the motor car was out of the doorway. Petitioner, however, denied the judge's suggestive question to the effect that the motor car could have been easily moved (R. 128), and on redirect examination stated that it would have taken the entire gang to move the motor car out of the doorway (R. 139). At the time the other men were inside the tool house (R. 127) and petitioner concededly made no request for help (R. 122). The foreman, however, was in charge of the crew and petitioner had no authority to give orders or instructions to the other members of the crew (R. 3, 122). Shortly following the foregoing cross examination of petitioner by the trial judge, the same court sustained the respondent's motion for a directed verdict. The court's stated basis for that action was that petitioner had not shown that the respondent railroad company was negligent. (R. 132, 133)

The stated grounds for the decision of the Court of Appeals are set forth in the final two paragraphs of the opinion (App. B). These will be examined in petitioner's argument.

ARGUMENT

Writ of Certiorari Should Be Granted

The Ohio courts have deprived petitioner of his basic and fundamental Federal right to trial by jury under the Federal Employers' Liability Act, Title 45, U.S.C., Sections 51 and following. A substantial portion of the relief granted by Congress under that Act has therefore been removed. *Dice vs. Akron, Canton, & Youngstown Railroad Co.*, 342 U.S. 359, *Blair vs. Baltimore & Ohio Railroad Company*, 323 U.S. 600.

The denial of jury trial in this case was perpetrated by the holding of the lower courts that the evidence of petitioner failed to show that respondent was negligent. In reaching this judicial conclusion, the Ohio courts failed to follow the fundamental concepts set forth in decisions of this Court, which control the determination of whether issues for the jury are presented under the Act. In addition, the holding of the lower courts on the facts was in conflict with the judgment of this Court in the cases of *Deen vs. Gulf Colorado and Santa Fe Rwy. Co.*, 353 U.S. 925, reversing 275 S.W. 2d 529, and *Thompson vs. Texas & Pacific Railway Co.*, 77 Sup. Ct. 698, reversing 232 Fed. 2d 313, where this Court applied the correct and controlling fundamental principles to reverse decisions of the lower courts which had similarly deprived raliroad workers of their right to trial by jury under the foregoing Act. In short, the Ohio courts have decided an important Federal question, namely, the right to trial by jury under a Federal act applying to hundreds of thousands of employees, by a judicial holding which is in conflict with the decisions of this Court on the facts, but even more serious, is in conflict with the fundamental concepts and principles set forth by this Court in determining whether issues of negligence are presented for the jury under that Act.

Petitioner will sustain the foregoing contentions in terms of the questions presented for review under the evidence in this case.

Question No. 1

Perhaps the foremost error of the lower courts was their holding in effect that respondent as a matter of law was not negligent and could not be held to anticipate injury to petitioner since there was no evidence that the loaded tub had been carried through the doorway while the motor car was parked in the doorway on any occasion previous to that when petitioner was injured. The trial court expressed the foregoing in the following words (App. A-28.):

> "There is no evidence that any of the employees had carried coal into the building under the same or similar conditions before and no knowledge attributed to defendant that coal would be carried into the building under such conditions."

The Court of Appeals said essentially the same thing in the following statement (App. B-32.):

> "In this case it appears to be the first time that the tub of coal was ever carried through the doorway while the motor car was in the entrance way, and it further appears that the place where the motor car rested was the place at which it was customarily moved whenever work was needed on it."

The foregoing concept applied by the Ohio courts would require a previous duplication or repetition of the precise circumstances of the petitioner's injury in order for a jury issue of negligence to be presented. This rule is in direct conflict with the decisions of this Court both in principle and in fact. In *Ferguson vs. Moore-McCormick Lines*, 352 U.S. 521, the employee was furnished a scoop for ice cream. The ice cream was frozen hard and the employee, unable to get the ice cream out of with the scoop, seized a sharp knife

and in attempting to get the ice cream out with the knife cut his hand. There was no evidence that the employee in that case had ever used the knife for that purpose previously. This Court clearly and specifically held that such evidence was not necessary to create an issue of foreseeability or anticipation on the part of the employer. The rule was stated at page 523:

> "It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident."

A fortiori, it was not necessary that the respondent railroad in this case be in such a position that it actually *observed* the *duplication* of the same exact chain of circumstances on occasions prior to the date of the petitioner's injury.

Similarly, in the leading case of *Rogers vs. Missouri-Pacific Railway Co.*, 352 U.S. 500, there was no evidence that any other employee than the petitioner in that case had, while backing away from a fire he himself had started, slipped and fallen over the culvert invloved in that case. Again, in the case of *Lillie vs. Thompson*, 332 U.S. 459, there was no evidence of any previous occurrence such as the one for which liability was imposed against the railroad, namely, the intentional and criminal assault by a third party upon a woman employee in an isolated shanty.

The controlling rule on the issue of foreseeability has been set forth by this Court that if the record discloses any probative facts from which a jury could find that the respondent railroad company was or should have been aware of conditions which created a likelihood that petitioner would suffer injury, then the issue must be submitted to the jury. *Rogers vs. Missouri-Pacific Railway Co.*, 352 U.S. 500, 503; *Ringhiser vs. Chesapeake & Ohio Railway Co.*, 354 U.S. 901. The evidence in this case clearly shows

that co-employee Brown went through the partially blocked doorway first, followed by the loaded tub of coal and then finally by petitioner. When the tub arrived at the doorway, there was insufficient clearance between the lower part of the motor car and the doorway. Petitioner, on the move and carrying the tub, was consequently forced to lift upward on the tub and at the same time to twist in order to permit the tub to pass through at a higher level where there was sufficient clearance between the side of the car and the doorway.

Certainly on that evidence fair-minded men could have concluded that respondent through its employee Brown could have anticipated, indeed observed, that the narrow clearance at the lower level would not permit passage of the tub and would require the petitioner who was following behind him to lift upward and that injury to petitioner might result from such an effort. In short, the requirement for a jury issue of negligence or foreseeability on the part of the respondent has been far exceeded on the foregoing evidence in this case. Here there was evidence of actual prior knowledge and notice on the part of respondent through its employee that the precise job which led to the injury was being performed and, in addition, actual participation in that same job (to the extent of leading the way) by respondent through its employee.

The foregoing proof of knowledge, notice and participation by respondent renders the lower courts' holding in irreconcilable conflict with the judgment of this Court in the case of *Harris vs. Pennsylvania R. Co.*, 361 U.S. 15. There the employee was injured while assisting in retracking derailed cars on the line and property of another railroad. The jury in answer to interrogatories found that the employer was negligent "in that the tie of the track he was required to walk was elevated a substantial distance above

the ground level and was covered with grease or oil, thereby affording unstable footing." Significant to the pertinent issue in the instant case, there was no evidence in the *Harris* case that the employer placed the oil or grease on the tie or knew anything about the conditions on the third-party property. The Ohio Supreme Court entered judgment for the railroad employer. This Court, however, applied the *Rogers* rule and reversed, holding that the foregoing finding of the jury did support a reasonable conclusion that employer negligence played a part in producing the employee's injury.

Thus the requirement for a jury issue on whether respondent could have anticipated injury in the *Harris* case was met, although it is clear that there was no evidence of any prior similar occurrence and no evidence of any actual knowledge by or notice to the employer of the conditions on third party property leading to the injury. Contrast the instant case where respondent through its employee had actual knowledge of and observation of the conditions on its own property, including those at the doorway, and then actively participated in the precise activities which under those known conditions in fact led to the petitioner's injury.

The *Harris* holding, we repeat, cannot be reconciled in principle with that of the Ohio courts herein.

In summary, the lower courts not only erred in applying the wrong test for a jury issue on foreseeability, but they unlawfully usurped the jury's function and attempted to carve out, circumvent or discount the foregoing plain evidence concerning respondent's co-employee. This attempt will be exposed in petitioner's argument and under Questions No. 2 and 3.

Questions No. 2 and 3

The Court of Appeals in its opinion referred to the foregoing contention of petitioner as follows (App. B-..):

> "* * * because the other employee went through the doorway first, it raised the question of knowledge through the other employee, that plaintiff could not get through the doorway while the motor car was in that position."

The Court of Appeals apparently could not answer that contention and the only possible reference thereto is found in the last paragraph of the same opinion (App. B-32.):

> "It does not appear from the record that there is any evidence indicating any unusual or extraordinary activity on the part of the railroad company * * *."

It is not clear whether the Court of Appeals recognized that the activity of the other employee did constitute activity on the part of the respondent railroad company, or whether the Court was simply referring to activity other than that of Brown as that of the railroad company. In either event, the Court of Appeals could not be correct. If the court meant to delete the conduct of employee Brown, then the court was simply and unlawfully carving out vital evidence by judicial fiat. If, on the other hand, the Court of Appeals meant to include the activity of that employee in the above reference, the Court was caught in its own inconsistency. In the very preceding paragraph the court made the point that the occasion of the injury was "the first time the tub of coal was ever carried through the doorway while the motor car was in the entranceway * * *." This could only have been stated in support of the court's judicial conclusion of non-negligence on the part of the respondent railroad and obviously referred to the immediately preceding paragraph as to whether "there were any probative facts from which a jury could find that the railroad

company was or should have been aware of conditions which created a likelihood that the petitioner would suffer such an injury as he did * * *." In other words, the jury could not so conclude, held the court, because this was the first time the tub of coal had been carried through the doorway while the motor car was in the entranceway. Yet in the next paragraph (if Brown's conduct is intended to be included) the court makes the completely inconsistent statement and holding that the same activity as a matter of law was not unusual or extraordinary! In short, it is logically untenable to make a judicial conclusion as a matter of law that Brown's carrying the tub through the blocked doorway was not "unusual or extraordinary" and at the same time to assert that very same activity, namely, that this was the first time that a tub of coal was ever carried through the blocked doorway, to support the opposite judicial conclusion that respondent as a matter of law could not have anticipated the same.

The trial court attempted to meet the same evidence head-on and in so doing unwittingly revealed the actual basis for his decision. In this respect the trial court stated (App. A-28.):

> "Counsel's argument that the other employee who was assisting in the process, by starting through the opening ahead of plaintiff, in effect, compelled plaintiff to follow, is not persuasive, as plaintiff had equal control over the method used and had as much right to stop as he had to proceed."

In this revealing paragraph the trial court in reality set forth the core of his reasoning, and it is quite probable that this same basis was implicit in the Court of Appeals' decision. The trial court held as a matter of law that petitioner had "equal control over the method used" with employee Brown, and petitioner "had as much right to

stop as he had to proceed." Even if we assume arguendo that those conclusions were the only reasonable ones which could be drawn from the evidence, the respondent was not absolved from responsibility as a matter of law; for even in that event Brown's equal control and conduct remained as the conduct and control of the respondent railroad. Brown's conduct and control could not be lawfully charged to petitioner on the ground that the latter had equal control in determining whether an issue of the negligence of *respondent* was presented. Otherwise, the outlawed fellow-servant rule has been excavated and given life contrary to the will of the Congress. *Tiller vs. Atlantic Coastline R. Co.*, 318 U.S. 54, 67. Similarly, petioner's equal control or right to stop or proceed (assuming that such was the only reasonable conclusion) could not absolve respondent from responsibilty as a matter of law. A contrary conclusion would (and the trial court did) inject the petitioner's conduct and choice, which could amount to no more than petitioner's contributory negligence or his assumption of the risks involved, as an unlawful and absolute defense to the respondent's duty to exercise reasonable care. This was, of course, contrary to the will of Congress expressed in the statutes dealing with contributory negligence and assumption of risk (Title 45, U.S.C., Sections 53 and 54). *Tiller v. Atlantic Coastline R. Co.*, 318 U.S. 54.

It is apparent in assessing the evidence that in fact opposite conclusions could be reasonably made. Fair-minded men could well conclude that since co-employee Brown arrived at the doorway first and was leading the way, he had the first and best opportunity to gauge the opening and to observe whether there was safety in passing through or not. Fair-minded men, moreover, could also conclude with reason that the petitioner, following behind

and carrying a moving tub of loaded coal, did not in fact have equal control over the job and could not have stopped without risking injury to his co-employee and perhaps to himself. While an argument to the contrary could be made on the evidence, the foregoing conclusively demonstrates that the issue was arguable and was exclusively within the jury's province to decide.

The lower courts were, in summary, in error in holding as a matter of law that petitioner had equal control and had as much right to stop as to proceed. On the evidence a contrary conclusion as a matter of fact could well have been reached by the jury. Even, however, if we assume that the only reasonable conclusion from the evidence is that petitioner had such control, then the result which the lower courts would impose, namely, non-negligence of respondent as a matter of law, could not lawfully follow. Such reasoning either unlawully eliminated the evidence of the other employee, or as a matter of law absolved respondent from its duty to exercise due care on the basis of the conduct and control of petitioner. The lower courts, therefore, injected either the fellow-servant rule or contributory negligence or assumption of risk by petitioner under the guise of a stated holding of non-negligence of respondent. This was another fundamental error of the lower courts in the unlawful denial of petitioner's right to trial by jury.

Questions No. 4 and 5

So far petitioner has confined the scope of his argument to the evidence in connection with the actual circumstances of the injury. An over-all view of the evidence in this case reveals still another fundamental error in the reasoning and holding by the Ohio courts. Those courts failed to apply the unitary rule of negligence which requires a reviewing court to view the evidence as a whole. The rule was

well stated in the descriptive words of Justice Holmes in the case of *Union Pacific Co. vs. Hadley*, 246 U.S. 330, at page 332:

> "On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. But the whole may be greater than the sum of its parts, and the Court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct viewed as a whole warranted a finding of neglect. Upon that point there can be no question."

The foregoing rule has been consistently applied in actions arising under the Federal Employers' Liability Act. *Bailey vs. Central Vermont Ryg. Co.*, 319 U.S. 350; *Blair vs. Baltimore & Ohio Railroad Company*, 323 U.S. 600; *Wilkerson vs. McCarthy*, 336 U.S. 53.

The evidence in this case presented conditions and circumstances wherein the court should have given particular note to that rule and applied the same; for many of the facts and conditions imparted character to each other and were interrelated so as to form a pattern which the jury could have concluded was negligence on the part of respondent. A consideration of "the whole bundle," not merely "each separate stick," would have included a survey of such evidence as: the fact that the tool house was the central gathering place of crewmen, the duty of petitioner to clear the area of coal, the lack of heating facilities other than a coal-burning stove in the toolhouse, petitioner's testimony that heat was necessary to prevent freezing of washing and toilet facilities in the toolhouse, the failure of the railroad to supply coal for that stove either in a bin or in a convenient pile close by or otherwise, the consequent neces-

sity for petitioner and others to scrounge for coal by picking it up among the various tracks and putting it into any receptacle they could lay their hands on, the necessity to use a wash tub for that purpose, the moving of the motor car into the doorway as a result of the lack of inside lighting so that repairs could be made, the knowledge of the foreman in charge that petitioner and Brown had gone out to gather coal in a wash tub for the purpose of taking the coal to the stove to provide heat, the foreman's knowledge of past practice in gathering coal, the foreman's knowledge that the motor car remained in the doorway after petitioner and Brown had started to obtain coal, the foreman's failure to order the removal of the motor car from the doorway, the fact that Brown was leading the way as he and petitioner approached the doorway carrying the tub, and the consequent lifting and twisting of the heavy tub of coal in order to get through the narrow opening in the doorway, between the side of the doorway and the side of the motor car.

From a consideration of the foregoing as a whole, fair-minded men certainly could conclude and find with reason a pattern of negligence on the part of the respondent railroad.

The holding of the Ohio courts was in conflict in principle, as we have shown, with leading decisions of this Court. In addition, that holding conflicted with analogous decisions of this Court on the evidence. In the case of *Thompson vs. Texas & Pacific Rwy. Co.*, 77 Sup. Ct. 698, reversing 232 Fed. 2d 313, this Court applying the *Rogers* rule held that issues of negligence on the part of the railroad were presented for the jury where a woman employee working alone was injured while handling mail even though there was an absence of evidence that the employee had asked for more help or that her employer had been notified that there was

more mail than she could handle or an unusually large amount of mail. In a similar case involving two employees, *Deen vs. Gulf Colorado & Santa Fe Ruy. Co.*, 353 U.S. 925, reversing 275 S.W. 2d 529, this Court again held that issues of negligence were presented for the jury where the employee was injured as he and another were tipping a bibbit pot, even though again the employee had not requested additional help and evidence showed that such help would have been furnished if requested.

In the foregoing *Thompson* and *Deen* cases, the intermediate courts applied the same formula as applied particularly by the trial court in this case, namely: petitioner was performing a task on his own, and the railroad did not direct him; he did not seek help and did not seek a safer method, although the latter was available; therefore, concluded the courts, the railroad could not have anticipated the injury, that is, the railroad was not negligent. This is precisely the same erroneous reasoning condemned in the *Tiller* case and applied by the trial court in the instant case, as we have shown.

We interject here, parenthetically, that in view of this Court's judgments in the *Deen* and *Thompson* cases, the validity of the prior decision of the Alabama Supreme Court in the case of *Louisville & Western Ruy. Co. vs. Green*, 53 S. 2d 358, is open to serious doubt. This was the case so heavily relied upon by the trial court and by respondent throughout these proceedings. Whatever weight may be attached to the *Green* case, that case is decisively and conclusively distinguished from the instant one on the basis of the evidence of employee Brown's actual knowledge of the conditions and participation in the activity leading to and including the petitioner's injury. No such evidence was present in the *Green* case.

If the Ohio courts had distinguished between petitioner's conduct and that of respondent as they were clearly required to do under the law, the correct inquiry in assessing the evidence in this case could then have been made. Was there evidence of any probative value to show negligence on the part of the respondent and did such negligence play any part, even the slightest, in producing the petitioner's injuries? If that test, aside from petitioner's conduct, had been applied as it should have been, one and only one lawful result would have followed. This was and is a case for the jury's determination.

CONCLUSION

This Court should grant writ of certiorari, review this case, reverse the judgment of the Court of Appeals and order a new trial of the issues by jury.

Respectfully submitted,

C. Richard Grieser,
8 East Broad Street, Columbus 15, Ohio,
Attorney for Petitioner.

APPENDIX A

Court of Common Pleas of Franklin County, Ohio

No. 200,175

CARSON J. MAY,

Plaintiff,

vs.

PENNSYLVANIA RAILROAD COMPANY,

Defendant.

DECISION

Rendered this 14th day of March, 1961.

REYNOLDS, J.

This case is before the Court on plaintiff's motion for a new trial.

The action is one of personal injuries claimed to have been suffered when plaintiff, an employee of defendant company, and another employee were endeavoring to carry a tub of coal into a tool shed past a motor car which stood in the doorway.

On the morning of January 15, 1957, a crew of trackmen went to a tool house of defendant company to prepare for the day's work. In this tool house was a motor car which was to be used and on which some work was to be done. In order to perform this work the motor car was pushed out into the doorway so that the men could see to do the required work, there being no artificial light in the building. After this work was completed, plaintiff and another employee proceeded to pick up coal along the tracks in the

vicinity of the building, both for the purpose of cleaning the right of way and for fuel to use in a stove in the building when desirable. From the evidence adduced, it appears that there was no fire in the stove at the time nor was it contemplated that the coal was to be used that morning, and the evidence is rather nebulous as to whether the men were gathering coal by an express order or simply from a suggestion of one of the crew.

Plaintiff testified that the foreman had requested him to get the coal, but the foreman himself testified that the getting of coal was suggested by one of the crew and he simply O.K'd the request.

In any event, this was a customary procedure whenever the supply of coal in the building was exhausted or low.

While the coal was being gathered, the foreman left to make a phone call, ostensibly to secure orders, and in his absence the men returned with the coal and proceeded to carry it into the building.

In order to do so, it was necessary to raise the tub of coal above the motor car as there was not enough room between the car and the side of the door frame for the tub to pass, and it was in the operation of raising the tub of coal that plaintiff claims to have been injured.

Plaintiff predicates his claim of liability as follows:

> "Defendant negligently failed to furnish plaintiff a safe place to work; defendant negligently failed to furnish plaintiff with safe or adequate equipment or a safer method or means of performing said job; defendant negligently blocked the entrance to the coal house with its motor car although it knew or should have known that plaintiff or other workmen would be required to carry coal through the entrance to said tool house."

At the conclusion of plaintiff's case, the Court sustained defendant's motion for a directed verdict, not as counsel

for plaintiff argue on the ground of plaintiff's contributory negligence or assumption of risk, but for a failure to prove any negligence on the part of defendant or a failure to furnish plaintiff a safe place to work.

As before pointed out, it was customary to gather coal along the track for the purposes already stated, and there is nothing to suggest that to use a tub with two handles, as the one in question was, was not a suitable or safe method for performing this work, so that the allegation that defendant failed to furnish safe equipment or a safer method for performing the work, fails entirely. It was a simple and usual process and there is no suggestion as to how otherwise it should be or could be done. Is it claimed that the defendant should have furnished mechanical equipment for the simple process of gathering coal? No suggestion is made as to how the work should have been done, merely a criticism of the method used.

Apparently on counsel's theory of the case, had plaintiff injured his back in stooping down to pick up a lump of coal, defendant would be liable for a failure to provide proper equipment for this work.

The claim is made the defendant was negligent in blocking the doorway. The fact is that the doorway was not blocked so as to interfere with the men passing in and out, and the motor car was there only temporarily and for the purpose of enabling the men to do some repairs thereon. It could easily have been pushed out or in as was either desired or necessitated, and it is not true, as counsel argue, that the foreman in charge had actual knowledge that a heavy tub of coal would be carried through that doorway.

There is absolutely no evidence that the foreman had any knowledge that the tub would be so filled as to make it difficult to carry, or that the men would try to carry it through the door through the narrow space available. It is

just as reasonable or consistent to argue that the foreman had actual knowledge that the men would not try to carry the coal into the building so long as the motor car was standing in the door, since there was no necessity for so doing.

The facts in this case differ materially from the facts in the case of *Wilkerson vs. McCarthy*, 336 U.S. 53. In that case the Supreme Court held that the Railroad Company was liable for injuries received by an employee in crossing a pit in a roundhouse over a board, rather than walking around the pit, only a slightly longer distance. The fact was that the employees had been accustomed to cross the pit on a 22-inch plank, four feet and two and a half inches long. The petition recited that defendant failed to furnish plaintiff a safe place in which to work in that the plank was not firmly set, was not securely attached, and had been permitted to become greasy, oily and slippery, thereby causing petitioner to lose his balance, slip and fall into the pit.

It appears that this means of crossing the pit was used as a walkway by all employees up to May 1, 1945, at which time the company put up "safety chains", inclosing a part of the pit on its north, south and west sides. The chains were fastened to posts 42 inches high and two inches from the top thereof. The posts were removable, fitting into tubes fastened in the ground and were kept up while the pit was in use, and taken down when the pit was not in use, and when the pit was completely covered with boards.

But even when the chains were up, the plank walk could be and was used, and was supposed to be used by pit workers. Plaintiff was not a pit worker but a switch man. According to the opinion, the company had never, even after the "safety chains" were installed, forbidden any of the workers from crossing the pit on the plank in ques-

tion, nor were written rules or spoken instructions promulgated forbidding any employee the use of said walk.

There was evidence adduced that switchmen and other employees continued the practice of using this walk at all times, whether the chains were up or down.

In its opinion the Court quoted from the decision of the Supreme Court of Utah, from which court the case was appealed to the U. S. Supreme Court, as follows:

> "It must be conceded that if defendants knew, or were charged with knowledge that switchmen and other workmen generally in the yard were habitually using the plank as a walkway in the manner claimed by plaintiff, then the safety enclosure might be entirely inadequate, and a jury question would have been presented on the condition of the board and the adequacy of the enclosure."

The U. S. Supreme Court then went to say:

> "We agree with this last quoted statement of the Utah Court, and since there was evidence to support a jury finding that employees generally had habitually used the board as a walkway, it was error for the trial judge to direct a verdict in favor of respondents."

The distinction between the facts in that case and the instant case is at once apparent. In that case as the Supreme Court said, if defendant had knowledge of the general and continued used of the walk by employees, it presented a question for the jury as to whether the company was negligent, but not as a matter of fact that it was negligent.

Here we have an isolated instance of a particular situation in which plaintiff was working with a motor car standing in the doorway which manifestly did not interfere with the ordinary ingress and egress from the building and which condition was created by the crew of which plaintiff was a part

There is no evidence that any of the employees had carried coal into the building under the same or similar conditions before and no knowledge attributed to defendant that coal would be carried into the building under such conditions.

Counsel's argument that the other employee who was assisting in the process, by starting through the opening ahead of plaintiff, in effect compelled plaintiff to follow, is not persuasive, as plaintiff had equal control over the method used and had as much right to stop as he had to proceed.

The case of *Louisville & W. R. Ry. Co. vs. Green*, 255 Ala. 642, presents an analogous situation. In that case the plaintiff injured his back while lifting a heavy sack of mail on top of a load of mail sacks he had already loaded on a truck and which were piled at a height above plaintiff's head.

Plaintiff secured a verdict upon the trial which was reversed by the Supreme Court of Alabama. In its opinion the Court said:

> "The evidence further tended to show that the average weight of the bags of mail handled by appellee was about 30 pounds and that postal clerks regularly and usually handled the bags without assistance and that appellee had not complained that the bags of mail were too heavy for him to handle; that no one told appellee how heavy a load to haul and transport at each trip to and from the postoffice; that he was free to place whatever number of bags of mail on each load and use either the four wheel truck or the two wheeled cart; that there were two or three other four wheeled trucks at the station which he could use in handling the mail, and that no one told him how to handle the bags of mail; that he had at least two hours idle time during his shift or tour of duty and there is nothing in the record to indicate that the element of time was a factor in causing appellee to load all the outgoing mail bags on one truck or to pile them high on one truck."

Syllabus No. 8 of that case reads as follows:

> "An employer cannot be held guilty of negligence, rendering him liable for injuries to employee, in failing to provide adequate force to do specific work if there is a safe and reasonable way for employee to do such work with force in hand, but may reasonably assume that employee will adopt such a plan as to conserve his own safety."

Here, as in the Green case, plaintiff was, as it were, on his own. No one told him how much coal to put in the tub, and no one directed him to deliver the coal into the building while the doorway was partially blocked, and there is nothing in the record to indicate that the element of time was a factor in causing the plaintiff to act as he did.

It would be difficult to find a case more nearly analogous to the instant case, both as to the operative facts and as to the principle involved.

The Court is of the same opinion now as at the time of directing the verdict, namely, that there is a complete lack of proof of any negligence on the part of defendant, and the plaintiff's motion for a new trial is overruled.

DANA F. REYNOLDS, *Judge.*

Appearances:
DOMBEY, TYLER, RICHARDS & GRIESER,
Attorneys for Plaintiff.
BRICKER, EVATT, BARTON, ECKLER & NIEHOFF,
Attorneys for Defendant.

APPENDIX B

In the Court of Appeals of Franklin County, Ohio

No. 6749

CARSON J. MAY,
Plaintiff-Appellant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellee.

OPINION

Rendered on March 13, 1962.

DOMBEY, TYLER, RICHARDS & GRIESER,
MR. ROBERT C. TYLER, and
MR. C. RICHARD GRIESER, *of Counsel*,
8 East Broad Street, Columbus 15, Ohio,
For Plaintiff-Appellant.

BRICKER, EVATT, BARTON, ECKLER & NIEHOFF,
MR. ROBERT L. BARTON, and
MR. JOHN ECKLER, *of Counsel*,
50 West Broad Street, Columbus 15, Ohio,
For Defendant-Appellee.

DUFFY, J.

From the judgment entered, following a direction of the verdict for the defendant, the plaintiff-appellant herein, has appeal to this court alleging that the trial court erred in instructing the jury to return a verdict in favor of the defendant-appellee herein, at the end of the plaintiff's case.

The plaintiff was a member of a track crew assigned to the job of maintaining the track and right of way of defendant. He reported for work at a tool house where the motor car, which transported the crew to and from their work, was kept. This tool house was heated by a pot-bellied stove, and it was the practice of the employees to gather coal from the tracks to use in the stove. There was no light provided inside this tool house and whenever work was needed on the motor car it was necessary to push the car out of the room so that the men could see to repair the car. That morning, work was needed to be performed on the motor car and, as was the custom, they pushed the car out and into a position so that it was partially in the doorway. While the work was being performed on the motor car the plaintiff and another employee went out along the track to gather coal and they returned with a tub full of coal after the car had been repaired but while it was still in the doorway. The foreman was on the telephone attempting to get clearance so that they could push the car out onto the main track and proceed to the place where they were to work that day. Plaintiff and his co-worker tried to carry the tub full of coal into the tool house while the motor car was in the doorway and they found it necessary to lift the tub upwards and, while the plaintiff was going through the doorway, he found it necessary to twist his body sideway and suffered an injury to his back.

The trial court directed a verdict solely on the ground that the plaintiff had not shown that the railroad company was negligent.

The plaintiff feels that, in view of the cases of *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S. Ct., 443, and *Harris v. Pennsylvania Roalroad Co.*, 361 U.S. 15, 80 S. Ct. 22, and numerous other holdings of the U. S. Supreme Court, the trial court was required to submit the question

of the railroad's negligence to the jury. He contends that the railroad was negligent in leaving the motor car in the doorway so that there was insufficient room for the employees carrying tubs of coal to get through, and because the other employee went through the doorway first, it raised the question of knowledge through the other employee, that plaintiff could not get through the doorway while the motor car was in that position.

If there were any probative facts from which a jury could find that the railroad company was or should have been aware of conditions which created a likelihood that the petitioner would suffer such an injury as he did, it is clear that the issue must be submitted to the jury. See *Ringhiser v. Chesapeake & Ohio Railway Company*, 354 U.S. 901, 77 S. Ct., 1093.

In this case it appears to be the first time that the tub of coal was ever carried through the doorway while the motor car was in the entrance way, and it further appears that the place where the motor car rested was the place at which it was customarily moved whenever work was needed on it.

It does not appear from the record that there is any evidence indicating any unusual or extraordinary activity on the part of the railroad company and, since the test is the negligence of the employer rather than an injury arising out of and received in the course of employment, we cannot say that the trial court was wrong. The judgment should be affirmed.

Judgment affirmed.

Duffy, P.J., and Bryant, J., concur.

APPENDIX C

In the Court of Appeals of Franklin County, Ohio

No. 6749

CARSON J. MAY,
Plaintiff-Appellant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellee.

ENTRY

This appeal came on for hearing on the assignments of error, the original papers and transcript from the Court of Common Pleas of Franklin County, Ohio, and on consideration of the briefs and argument of counsel, the Court find there is no error prejudicial to appellant apparent on the record in the proceedings and judgment by the court below; and that substantial justice has been done but there was a reasonable cause for the appeal.

It is, therefore, considered and adjudged that the judgment of the court below be and it is hereby affirmed, without penalty.

It is further ordered and adjudged that appellant pay the costs of this proceedings.

s/ J. DUFFY,
s/ J. DUFFEY,
s/ J. BRYANT.

Approved:
DOMBEY, TYLER, RICHARDS & GRIESER,
Attorneys for Plaintiff-Appellant.
BRICKER, EVATT, BARTON, ECKLER & NIEHOFF,
Attorneys for Defendant-Appellee.

Filed March 29, 1962.

APPENDIX D

In the Supreme Court of Ohio

No. 37593

CARSON J. MAY,
Plaintiff-Appellant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
A CORPORATION,
Defendant-Appellee.

NOTICE OF APPEAL

Carson May, plaintiff-appellant in case No. 6749 in the Court of Appeals for Franklin County, Ohio, hereby files in this court his notice of appeal to the Supreme Court of Ohio from the entry of judgment rendered by the Court of Appeals from Franklin County, Ohio, in case No. 6749 and journalized on the 29th day of March, 1962, which judgment affirmed the judgment of the Court of Common Pleas for Franklin County, Ohio rendered in favor of defendant-appellee and against plaintiff-appellant.

The parties in said appeal in case No. 6749 in the Court of Appeals for Franklin County, Ohio were Carson May, plaintiff-appellant and the Pennsylvania Railroad Company, a corporation, defendant-appellee. This appeal is on questions of law and is taken on condition that a motion to certify record be allowed by the Supreme Court of Ohio.

s/ Dombey, Tyler, Richards & Grieser,
Eight East Broad Street, Columbus 15, Ohio,
Attorneys for Plaintiff-Appellant.

Proof of Service

The undersigned, attorneys for the Pennsylvania Railroad Company, a corporation, defendant-appellee, hereby acknowledges receipt of a copy of the foregoing Notice of Appeal on this 16th day of April, 1962.

/s/ Bricker, Evatt, Barton, Eckler & Niehoff,
50 West Broad Street, Columbus 15, Ohio,
Attorneys for Defendant-Appellee.

In the Supreme Court of Ohio

No. 37593

CARSON J. MAY,
Plaintiff-Appellant,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellee.

MOTION TO CERTIFY RECORD

Carson J. May, the plaintiff-appellant herein, moves this Court for an order directing and requiring the Court of Appeals of Franklin County, Ohio, to certify the record in Case No. 6749 in said Court of Appeals for review by this Court, in which said Court of Appeals Carson J. May was plaintiff-appellant and the Pennsylvania Railroad Company was defendant-appellee.

The grounds for this motion are:

1. That the questions and issues involved in this case are of public and great general interest;

2. That error prejudicial to plaintiff-appellant was committed in this case in the Court of Common Pleas wherein judgment was entered in favor of defendant-appellee pursuant to a directed verdict and in the Court of Appeals of Franklin County, Ohio, whereby judgment was entered affirming the aforesaid judgment of the Court of Common Pleas.

Plaintiff-appellant filed Notice of Appeal in the Court of Appeals of Franklin County, Ohio, and in this Court on April 17, 1962.

The grounds for granting of this Motion to Certify, as heretofore set forth, will be presented more fully in plaintiff-appellant's assignment of errors and brief in support of this motion.

Respectfully submitted,

DOMBEY, TYLER, RICHARDS & GRIESER,
8 East Broad Street, Columbus 15, Ohio,
Attorneys for Plaintiff-Appellant.

Acknowledgment of Service

A copy of the foregoing Motion to Certify Record was received by the undersigned, counsel for defendant-appellee, on this ... day of April, 1962.

Attorney for Pennsylvania Railroad Company,
Defendant-Appellee.

In the Supreme Court of Ohio

Appeal from the Court of Appeals for the
Tenth District of Ohio
Franklin County

(No. 6749)

CARSON J. MAY,
Plaintiff-Appellant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellee.

ASSIGNMENT OF ERRORS AND BRIEF OF THE PLAINTIFF-APPELLANT IN SUPPORT OF MOTION TO CERTIFY

ASSIGNMENT OF ERRORS

Carson J. May, plaintiff-appellant, hereby makes and files the following Assignment of Errors herein, each of which is prejudicial to the rights of plaintiff-appellant:

1. The Court of Common Pleas for Franklin County, Ohio, erred in directing the jury to return a verdict in favor of defendant at the close of plaintiff's case and in entering judgment thereon.
2. The said trial court erred in overruling plaintiff's motion for new trial.
3. The Court of Appeals for Franklin County, Ohio, erred in affirming the judgment of the said Court of Common Pleas.

Carson J. May.
Attorneys for Plaintiff-Appellant.

THE SUPREME COURT OF THE STATE OF OHIO

1962 TERM

THE STATE OF OHIO,
City of Columbus.

To wit: Wednesday, October 10, 1962.

No. 37593

CARSON J. MAY,
Plaintiff-Appellant,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellee.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR FRANKLIN COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled. Costs:

Motion Fee, $20.00, paid by Dombey, Tyler, Richards & Grieser.

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MAR 31 1952
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No. 721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

CARSON J. MAY,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT L. BARTON,
50 West Broad Street, Columbus, Ohio
Attorney for Respondent.

C. EDWARD GERHARDT,
8 East Broad Street, Columbus, Ohio,
Attorney for Petitioner.

MIDWEST LAW PRINTING AND PUBLISHING INC., Columbus 15, Ohio

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 721

CARSON J. MAY,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED FOR REVIEW

Where an employee of a railroad, together with another employee, left a tool house to gather coal along the tracks adjacent to the tool house, and where the coal was to be collected in a washtub and used to fuel a stove in the tool house, and where the employee was not under orders to gather a certain amount of coal or to gather coal in a certain period of time, and where the employee, having gathered some coal, returned to the tool house and carried the washtub through the doorway in which a motor car was situated and where the employee alleged injuries as a result of having to lift the washtub up and to the side in order to carry it past the motor car, were the trial court and the

Court of Appeals correct in holding that there was no evidence of negligence on the part of the railroad under the Federal Employer Liability Act, Title 45 U.S.C.A. Sec. 51, which caused the alleged injuries?

STATEMENT OF THE CASE

The facts of this case appear in the Statement of the Case set forth in the brief of petitioner. Respondent only wishes to add that it is clear that petitioner volunteered and was not directed to gather the coal. (R. 77). Furthermore, petitioner had at other times gathered coal and used the same washtub. (R. 114). The coal carried on previous occasions varied as to amount. (R. 121). The petitioner was under no pressure to hurry up the process of gathering the coal (R. 128), and no request for assistance was made. (R. 122). The other members of the track crew were in the tool house as petitioner was carrying the coal through the doorway (R. 122, 127).

ARGUMENT

I. There was no evidence of negligence under 45 U.S.C., Section 51.

At the outset it should be stated that there were two legal issues involved in this case in the trial court. The first issue was that of the sufficiency of evidence of negligence on the part of respondent. The second issue was whether or not the alleged injuries were caused solely by the negligence of petitioner himself. Both of these issues were pursued in the trial court and they would appear again in any re-trial of the case. The trial court, in sustaining respondent's motion for a directed verdict, did so solely on the basis that there was no evidence of negligence on behalf of respondent. The petitioner attempts to show that the trial court interjected contributory negligence and assumption of risk into the decision. The respondent submits that it is perfectly clear, indeed the trial court made it so, that the decision was based on the failure of petitioner to show negligence on the part of respondent. Thus, even though it is apparent that the alleged injuries were caused solely by negligence of petitioner, the issue before this Court is whether or not there was sufficient evidence of negligence of respondent so that the question should have been submitted to the jury.

This issue can be answered by a careful analysis of the concept of negligence and its application to the facts of this case. There should be no need to cite authorities for the definition of negligence as the lack of due care under the circumstances or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances. E.g., *Wilkerson v. McCarthy*, 336 U.S. 53 (1949), *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54 (1943). This action, or inaction, of the hypothetical reasonable man

is governed by what he anticipates to be the consequences of his action or inaction under the circumstances. It is the likelihood of a resulting injury that causes the reasonable man to act in a certain manner. E.g., *Schlemmer v. Buffalo R. & P.R. Co.*, 205 U. S. 1 (1907).

There is no authority that the above concept of negligence has been altered in any Federal Employers Liability Act cases. Indeed, there are many recent authorities in which this principle has been expressly set forth. In the case of *Inman v. Baltimore & O.R. Co.*, 361 U.S. 138 (1959), this court affirmed a judgment for defendant on the basis of insufficiency of evidence of negligence. The Court said at page 140:

> "The Court of Appeals of Ohio reversed, finding that 'there was a complete failure of proof to establish the negligence'. It said that it was not 'reasonably foreseeable' that petitioner 'would be injured by the action of a drunken driver, violating five traffic statutes . . .'"

It is interesting to note how the Court of Appeals of Summit County, Ohio, in deciding the *Inman* case, 108 O. App. 124, dealt with the often confused concepts of causation and negligence. The court found that the alleged injury was not reasonably foreseeable, and then said at page 131:

> "There was accordingly, no duty imposed on defendant to anticipate such an occurrence as eventuated, and hence no negligence for failure to guard against it."

The case of *Ringhiser v. Chesapeake & O.R.C.*, 354 U.S. 901 (1957) also makes clear that the prospect of the injury is an integral part of negligence. The Court in that case said at page 901:

> "In that circumstance there were probative facts from which the jury could find that respondent was or

> should have been aware of conditions which created a likelihood that the petitioner would suffer just such an injury as he did."

In the case of *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521 (1957) this court acknowledged the concept of foreseeability of an injury as a part of negligence. In that case, an employee injured himself with a butcher knife which he used to cut ice cream when he discovered the ice cream was too hard to permit use of an ice cream scoop. The Court said at page 523:

> "On this record, fair minded men could conclude that respondent should have foreseen that petitioner might be tempted to use a knife to perform his task with dispatch, since no adequate implement was furnished him."

Therefore, it is established that there can be negligence only where an injury is reasonably foreseeable under the circumstances. This is the standard which measures the conduct of the reasonable man. In the instant case, the remarks of the lower courts in their review of the evidence were clearly referable as to what respondent should reasonably have foreseen or anticipated and, therefore, to the issue of negligence.

Before applying the facts of the instant case to the concept of negligence, the respondent wishes to clarify one common erroneous citation. It is often urged that the case of *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957) requires that the question of employer negligence be submitted to the jury. A careful reading of the *Rogers* case shows no variation in the traditional treatment of negligence. Indeed the commonly quoted Rogers rule concerns

itself not with negligence but rather with the issue of causation. The rule is found at page 506 as follows:

> "Under the statute the test of a jury case is simply whether the proofs justify *with reason* the conclusion that *employer negligence* played any part, even the slightest, in producing the injury or death for which damages are sought." (Emphasis added)

Thus, it is apparent that the *Rogers* case does not modify any of the standards previously established to test employer negligence, and the above rule presumes that there must still be evidence of negligence before applying its causation test. Indeed, the Court said at page 503:

> "There were probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that petitioner, in performing the duties required of him, would suffer just such an injury as he did."

The respondent submits that, in the instant case, the trial court was absolutely correct in finding no negligence for the reason that the evidence contains nothing to indicate that respondent had any reason to anticipate an injury to petitioner under the circumstances. There is no evidence in the record that coal had previously been carried through the doorway while the motor car was situated in the doorway, although it was uncontroverted that the motor car was frequently placed in such a position. The amount of coal to be gathered and the time in which the coal was procured were purely a matter of choice of the petitioner and his companion. There was no evidence that the washtub was inadequate for the purpose of carrying coal, nor any evidence that any one else had ever sustained such an injury.

In the case of *Wolfe v. Henwood*, (Cir. 8, 1947) 162 F. (2d) 998, the court found no negligence on behalf of the

employer. In that case the plaintiff had dipped fuel oil from a catch basin, and, after removing the oil from his clothes with gasoline-soaked rags, was burned while attempting to burn the rags. The court could find no negligence in the failure to provide a pump for removing the fuel oil, or in the failure to provide cleansing facilities. In noting that there were cleansing facilities several hundred feet away, the court stated that the plaintiff was acting on his own initiative when he burned the waste. The court said at page 1001:

> "It was not the method that was unsafe, *rather it was the time and manner of its use.*" (Emphasis added)

In the case of *McGivern v. Northern Pac. Ry. Co.*, (Cir. 8, 1942) 132 F. (2d) 213, an employee was injured when he slipped from a footboard that had accumulated snow and ice while the employee was working. The court affirmed a directed verdict for the defendant and held that the duty to provide a safe place to work does not extend to temporary conditions created by employees using or failing to use appliances furnished by the employer. The court observed that the employee could have cleaned the footboard if he thought it advisable. The court said at page 218:

> "The defendant could not anticipate that McGivern would not exercise proper care for his own safety and we can only conclude in view of his knowledge and experience, that he did not believe the footboard required cleaning."

The lack of negligence on the part of respondent is clearly shown in *Wadiak v. Illinois Cent. R. Co.*, (Cir. 7, 1953) 208 F. (2d) 925. In that case an employee was injured when he and a fellow employee lifted a barrel to a position on top of other barrels. Lifting equipment was available for the employees use. The court held that a directed verdict

should have been granted to defendant. In the course of its opinion the court observed that the employee made no attempt to seek help from the other workmen. The court said at pages 929 and 930:

> "Plaintiff's contention that defendant was negligent in failing to afford him a safe place to work was abandoned before the case went to the jury and is not now before us. Assuming, *arguendo*, however, that this question is presented, that is no evidence to the effect that the conditions in the car were inherently dangerous, or that any danger present was not readily apparent to a car repairman of reasonable prudence."

A case which bears marked similarity to the present case is *Louisville and N. R. Co. v. Green*, 255 Ala. 642, 53 So. (2d) (1951), in which an employee was injured while lifting mail bags onto a four-wheeled truck. The injury occurred as the employee was lifting the bag to the top of the pile, the top being about a foot above the employee's head. The court reversed a jury verdict for the plaintiff and took careful note that time was not a factor in loading and that no one told him how heavy the load should be, the employee being free to place as many bags as he wanted to on the truck. At page 648 the court said:

> "But it is equally true that appellee was not compelled under any phase of the evidence, to lift the sack of mail to the height which caused the injury.
>
> "The evidence indicates that the sack of mail which appellee was handling at the time of injury was heavier than the ordinary sack of mail. But be that as it may, *we do not think that appellant could have reasonably foreseen such an event, coupled with the further contingency that appellee would attempt to lift it to such a height as he did*, when a less hazardous method was available to him, in which method he was at liberty to choose." (Emphasis added)

Analysis of the cases in the light of the concept of negligence as set down by this Court clearly shows that the

respondent herein did not breach its duty of acting as a reasonable and prudent person under the circumstances. It should be emphasized here that, contrary to petitioner's assertion, it cannot be assumed that *Louisville and N. R. Co. v. Green*, *supra*, has been nullified by the Supreme Court decisions in the cases of *Dean v. Gulf, Colo. and S. F. Ry. Co.*, 353 U.S. 925 (1957) and *Thomson v. Texas and Pacific Ry. Co.*, 353 U.S. 926 (1957). Both *Dean* and *Thomson* were *per curiam* decisions, the effect of which were to affirm jury verdicts rendered in the trial courts. This means only that the Court felt the jury verdicts were justified on the facts of those cases, which were not identical to the *Green* case. The *Thomson* case concerned a woman mail handler who became injured in the course of her duties. She alleged failure to provide her with additional help. Although there was no evidence that she requested additional help, there was evidence that she had been told never to ask for such assistance. In the *Dean* case, an employee was injured as he and a fellow employee were attempting to tip over a heavy babbit pot. Although it was found that there was a failure to furnish the employee with proper tools, the lower court felt there was no negligence because there was additional manpower available. The lower court overlooked the evidence that on many prior occasions the babbit pot had been tipped by hand, and also the evidence that there was a hurry to get the particular job done on time. Thus, the *Green* case differs materially from the *Thomson* and *Dean* cases on its facts, and it should apply here with force.

Petitioner cites a few of the many F. E. L. A. cases in which the question of negligence was held for the jury. Although each F. E. L. A. case stands on its own facts, there are some common threads of fact patterns which prevail in

many of the cases and which provide a continuity to the decisions. They provide an insight as to why an injury is reasonably foreseeable under certain conditions. Two of the most common are prior identical conduct by employees which ultimately results in an injury to a particular employee and the performance of a duty by an employee (ultimately injured) under a given time limitation. In other words, if employees customarily acted in a certain way under certain conditions, the employer should anticipate subsequent acts under the same conditions. Similarly, although there is no such prior conduct, an employee who is given the impression that time is a factor in the performance of his duty, may be anticipated to act under the conditions then existing.

An excellent example of prior usage is *Wilkerson v. McCarthy, supra*. That case differs from the instant case in that defendant knew that employees were long accustomed to crossing a narrow, oil and grease-covered plank. The Court felt that defendant should have taken some precaution (there was no evidence presented that the chain around the pit had been put there to prevent access to the plank) because it could be anticipated that an employee might slip on such a plank. As to the prior usage, the Court said at pages 58 and 59:

> "Switchmen and other employees, just as pit workers continued to use the permanent board to walk across the pit after the chains were put up as they had used it before. Petitioner and another witness employed on work around the pit, testified positively that such practice continued."

In the case of *Ringhiser v. Chesapeake and O. R. Co., supra*, prior conduct was the important factor. That case involved an employee who was injured when a gondola

car, which he was using as a toilet, was jolted. In a *per curiam* decision, the Court said at page 901:

> "The trial judge set aside the jury verdict for petitioner, because, inter alia, it was held that the respondent 'had no duty to anticipate that a car was being used for such a purpose.' There was evidence, however, as the trial court found, *that to respondent's knowledge employees used gondola cars for the purpose*." (Emphasis added)

In many cases where there has been no prior conduct of employees, the factor of time in which the duty was to be performed was considered important. Petitioner urges that prior conduct is not a prerequisite of an F. E. L. A. case, but the very case he cites on page 11 of his brief, *Ferguson v. Moore-McCormack Lines*, *supra*, is an illustration where the factor of time was important. In discussing the employee's use of a butcher knife to scoop out ice cream, the Court said at page 523:

> "Finally, there was evidence that petitioner had been instructed to give the waiters prompt service."

It is pertinent here to repeat a quotation previously made herein from the *Ferguson* case to emphasize that the time factor was an important consideration in the holding of the Court. At page 523 it was held:

> "On this record, fair minded men could conclude that respondent should have foreseen that petitioner might be tempted to use a knife to perform his task *with dispatch*, since no adequate equipment was furnished him." (Emphasis added)

In the case of *Davis v. Virginian R. Co.*, 361 U.S. 354 (1960) an employee was injured while engaged in a spotting operation. The Court said at page 356:

> "We think it should have been left to the jury to decide whether the respondent's direction to complete

> the spotting operation within 30 minutes, plus the inexperience of the brakemen assigned to perform this 'hot job", might have precipitated petition's injury."

Of course, there are other crucial factors besides the situations of prior conduct or usage and time limitations. For example, there is the situation of an employer direction to an employee to perform a duty in an inherently dangerous place. *Rogers v. Missouri Pacific R. Co., supra; Lillie v. Thompson*, 332 U. S. 459 (1947), (see page 12 of petitioner's brief). The two common factors discussed above, however, are particularly important by their absence in the instant case.

It can not be more clear that, in order to prove negligence, there must be evidence which shows that an injury is reasonably foreseeable. The respondent submits that there was no such evidence in the instant case. There was no evidence to indicate that respondent should have anticipated such an injury as petitioner alleges. There was no evidence that coal had been so carried on prior occasions, and the evidence is clear that petitioner was under no pressure to complete the gathering of the coal in a given time. Furthermore, the cases indicate that there must be positive proof of employer negligence. The recent case of *New York, New Haven and Hartford R. Co. v. Heneghan*, 364 U.S. 441, 5 L. ed. (2d) 183 (1960) concerned an employee who claimed to have sustained injuries as a result of an emergency application of the brakes by the engineer of the train in an effort to avoid striking a person who was on the tracks for the apparent purpose of committing suicide. The trial judge allowed a jury verdict to stand only because he felt that the trend of decisions from the

Supreme Court of the United States dictated that such a case should go to the jury. The Court of Appeals affirmed. However, this Court, in its decision of November 21, 1960, stated that the proofs were insufficient to submit the case to the jury.

In *Inman v. Baltimore and O. R. Co., supra*, there was some evidence of the type this Court indicated was necessary to prove negligence. But this Court felt that the evidence available was "too slender a reed" upon which to say the decision of Ohio's Court was erroneous.

The respondent resolutely maintains that the trial court in the instant case was correct in its view of the evidence and in sustaining respondent's motion for a directed verdict. The trial court appropriately applied the rule set down in *Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943), an F. E. L. A. case, where the Court said at pages 479 and 480:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by . . . directing verdict . . . without submission to the jury . . . By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

The Court of Appeals was likewise correct in affirming the decision of the trial court after once again reviewing the evidence.

It is apparent that the occasion for petitioner's injury is the same as that which confronted the court in *Louisville and N. R. Co. v. Greco, supra*, and was stated at page 648:

> "The situation here simply shows a regrettable incident for which appellant is not responsible, since its duty to appellee was fully discharged."

II. Petitioner Has Failed to State a Case For Writ of Certiorari.

It has already been pointed out that the decisions of the Courts below were decided in a way which was in accord with the applicable decisions of this Court. There was no federal question of substance decided which has not heretofore been decided by this Court. The sole issue of whether or not the facts of the instant case warrant submission of the question of negligence to a jury was thoroughly considered by the lower courts under the applicable decisions of this Court and decided in the negative.

The petitioner is asking this Court to once again assess the same evidence that has already been assessed by the trial court and the Court of Appeals.

It is submitted that the evidentiary issue here involved does not meet the test of Rule 19 of the Revised Rules of the Supreme Court of the United States which provides for the granting of a writ of certiorari "only where there are special and important reasons therefor." This Court is referred to the separate opinion of Mr. Justice Roberts in the case of *Bailey v. Central Vermont R. Co.*, 319 U.S. 350 (1942), wherein it is stated at page 358:

> "It seems to be thought, however, that any ruling which takes a case from the jury, albeit it will not serve as a precedent, is of such paramount importance as to require review here. I merely state my conviction that the Seventh Amendment envisages trial not by jury, but by court and jury, according to the view of the common law, and that federal and state courts have not usurped power denied them by the fundamental law in directing verdicts where a party failed to adduce proof to support his contention, or in entering judgment notwithstanding a verdict for like reason. But this I do say, that this court does not sit to redress every apparent error committed by competent and responsible courts whose judgments we are empowered

to review. And, if we undertake any such task, we shall disenable the court to fulfill its high office in the scheme of our government."

Clearly, there are no "special and important reasons" for a writ of certiorari where lower courts have properly considered and applied the well established law.

CONCLUSION

In conclusion, it is submitted that the only question presented to this Court for review is the evidentiary issue of whether or not there was such evidence that the question of negligence should have been submitted to the jury. The lower courts applied the law as set forth in the decisions of this Court and no conflict has been created thereby. Petitioner has, therefore, failed to state a sufficient cause to merit further consideration by this Court on writ of certiorari.

Wherefore, respondent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Office-Supreme Court, U.S.
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No. 721

In the

Supreme Court of the United States

OCTOBER TERM, 1962

CARSON J. MAY,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,
A CORPORATION,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR FRANKLIN COUNTY, OHIO

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Petitioner, Carson J. May, prays for a rehearing of this Court's order entered in the above case on February 18, 1963, which order denied petition for writ of certiorari to the Court of Appeals for Franklin County, Ohio, to review the judgment and decision of that Court of Appeals in Case No. 6749 entitled Carson J. May vs. Pennsylvania Railroad Company, a corporation.

This petition for rehearing is predicated upon the decision of this Court in the case of *Gallick vs. Baltimore & Ohio Railroad Company*, ... U.S. ....., (No. 76, October Term, 1962), which decision was an

nounced and rendered subsequent to the filing of petition for certiorari in the instant case and on the same date that the order denying petition for certiorari herein was entered.

This case, like the *Gallick* case, was an action arising under the Federal Employers' Liability Act (Title 45, U.S.C., Sections 51 and following) and originated in the state courts of Ohio. The principal basis upon which the Court of Appeals affirmed the directed verdict against petitioner in this case is in direct conflict with the holding of this Court in the *Gallick* case on the test to be applied in determining an issue of the railroad's foreseeability of harm under that Act. In support of its judicial conclusion that the respondent railroad herein was as a matter of law not negligent, the Court of Appeals for Franklin County stated in its opinion (Petition for Certiorari, App. B-32):

> "In this case it appears to be the first time that the tub of coal was ever carried through the doorway while the motor car was in the entranceway, * * *."

In *Gallick* this Court expressly condemned and held erroneous the charge of the trial court on the issue of the railroad's reasonable anticipation or foreseeability, which charge was identical in principle to the foregoing statement of the Court of Appeals in this case. In condemning that concept, this Court stated and held:

> "In the second place, in deciding whether respondent had reason to anticipate and foresee any harm to petitioner, the trial court instructed the jury to take into account 'the past experience respecting the location and conditions in question' and the fact 'that no occurrence of the kind here alleged either occurred, or was known by defendant to have occurred, at or near this place before August of 1954.' The jury thus might have determined that, since there had been no similar incidents at this pool in the past, the respondent had no specific 'reason' for anticipating a mishap or injury to

petitioner—a far too narrow a concept of foreseeable harm to negative negligence under the Federal Employers' Liability Act."

A surface examination of the two cases may prompt the observation that in the instant case the issue was one of the sufficiency of the evidence to support a finding of negligence of the railroad while in the *Gallick* case this Court was dealing primarily with the sufficiency of the evidence to support a finding of causal relationship between antecedent negligence of the railroad and the injuries of the employee. Such a surface examination will also reveal the obvious dissimilarity between the facts in the two cases. A quick conclusion might be reached, therefore, that the decision of the Court of Appeals in this case is not in conflict with this Court's decision in the *Gallick* case.

A penetrating and sound analysis, however, will dispel such a conclusion. First, "a far too narrow a concept of foreseeable harm" constitutes an equally erroneous test whether applied to determine an issue of negligence or an issue of causal relationship between negligence and harm. Indeed, the two issues are in logic interrelated and interlocked, and the element of foreseeability is common to both. It follows that the correct test to determine foreseeability must be identical and consistent as applied to each of those issues.

Secondly, in the foregoing portion of the *Gallick* decision, quoted supra, this Court was directly considering the issue of the railroad's negligence in connection with the special findings of the jury. The alternative ground of the respondent railroad in that case was based upon the contention that the injury was not reasonably foreseeable, and that, therefore, there was no *negligence*. This Court prefaced its opin-

ion with respect to this alternative ground in the following statement:

> "We agree with respondent that reasonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act *negligence*." (emphasis supplied)

Thereafter, this Court in that portion of the opinion first quoted supra, condemned the charge of the trial court as a far too narrow concept of foreseeable harm "to negative *negligence* under the Federal Employers' Liability Act." (emphasis supplied) It is clear, therefore, that this Court held in the *Gallick* case that the concept of whether any similar incident had occurred previously was far too narrow and erroneous whether applied to the issue of negligence or to the issue of causal relationship between negligence and harm.

The Court of Appeals in this case applied that identical erroneous concept to the issue of negligence and thereby deprived petitioner of his right to trial by jury.

Thirdly and in elaboration of the foregoing, the *Gallick* holding on foreseeable harm, although applied to dissimilar facts, does apply in principle to this case. The only lawful result of such application is a case for the jury. In *Gallick* the link between the conditions for which the railroad was responsible and the accrual of the cause of action was the bite of an insect resulting from or coming from those conditions. If the respondent railroad could have reasonably foreseen that an insect emanating from those conditions might bite an employee, in other words, the legal requirement for a jury issue on respondent's foreseeability of harm was sufficed, even though such link could be found only by inference. It was error, moreover, even to inform the jury that lack of a similar prior incident could negate such reasonable foreseeability. In the instant case for the

purpose of this petition we may assume (although we do not concede) that there were no unusual antecedent conditions. The motor car was blocking the doorway as it had in the past. A tub loaded with coal had not previously been carried through the doorway while blocked by the motor car, but the tub had been carried through the open doorway previously. The cause of action accrued to petitioner when he was forced to twist *after* an employee of respondent preceded petitioner with that loaded tub through the obstructed passageway. That act or conduct of respondent through its employee, like the antecedent conditions existing in *Gallick*, was the "spring board" from which injury to the employee eventually resulted. It certainly was as reasonable for respondent to foresee that injury or harm to petitioner might result from that act as it was for respondent to foresee that an insect bite (equated with harm) might result from the conditions in *Gallick*.

The Court of Appeals, therefore, committed the same error in principle in holding that there was no negligence because the loaded tub had never previously been carried through the doorway while it was blocked, as that of the trial court in the *Gallick* case in instructing that the jury could consider the fact that no such incident as the insect bite had ever occurred before. In each case an erroneous test of foreseeability of harm was applied. The only difference was that in the instant case the error denied a jury trial altogether, whereas in *Gallick* the error led to a special finding which could have been given an unlawful effect.

There exists, therefore, at present in the State of Ohio the following inconsistency in the jurisprudence dealing with cases arising under the Federal Employers' Liability Act: a fundamental error of law has been condemned by this Court where incorporated as a part of the trial court's instructions to the jury, but that same error stands unre-

versed where applied to the ultimate extent of depriving the employee of his right to trial by jury. This case is, we submit, accordingly deserving of certiorari jurisdiction; and this Court should remove and correct that inconsistency.

Respectfully submitted,

C. Richard Grieser,
8 East Broad Street, Columbus 15, Ohio,
Attorney for Petitioner.

CERTIFICATE

The undersigned attorney for petitioner, by manuscript signature hereto, does certify to this Court that the foregoing Petition for Rehearing is presented to this Court in good faith and upon the grounds set forth therein relating to the intervening decision of this Court cited therein, and is not presented for delay.

C. Richard Grieser,
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Attorney for Petitioner.